Later this month, the Supreme Court will hear oral argument about whether to stay a plan issued by EPA to limit upwind states from creating ozone pollution that impacts other states. As I wrote before the Court decided to hear the arguments, the issues here seem less than earthshaking, and for that matter, less than urgent. It was puzzling to me why after many weeks the Court was still sitting on the "emergency" requests of the upwind states to be rescued from the EPA plan. Given that the Court seems to think the issues are important enough to justify oral argument, however, it's worth examining what seems to be bothering the Court about implementing the EPA plan.

The procedural background of the case is messy. For reasons that aren't clear, EPA failed to start the process for issuing the plan until its hand was forced by a lawsuit. It then disapproved plans submitted by state governments much earlier and went ahead to issue a plan covering sources in 23 upwind states. About half these states went to court to challenge the disapproval of their own plans and received stays of the disapprovals. The result is that the plan is now in effect in only 11 upwind states.

The challenges to the plan raise a bunch of other issues, but the Court seems interested in how the subsequent stays (and potential invalidity) of EPA's disapprovals impacts its plan. In particular, the Court asked the parties to address whether the emission controls imposed by the EPA plan are reasonable regardless of the number of states covered by the plan. This seems to have been prompted by the challengers' argument that EPA had stressed the need for equitable and uniform treatment of the upwind states, and that EPA should have taken into account the risk that some states would successfully challenge EPA's disapproval of their own plans. EPA says that it explicitly said that the rule was severable and should apply even if the courts later exempted some states.

There are some tricky timing-related issues that the Court will have to deal with before reaching this issue. The first stays were not issued until after EPA had already posted its final plan on its website, but before the plan was officially published in the Federal Register. The challengers say that EPA had the duty to reconsider its plan during this interim period because of the stays. EPA says the record was already closed at that point and that it was not required to do updates unless someone requested reconsideration by the states. A related issue whether comments filed earlier in the rule making process gave EPA sufficient notice that its plan might be inequitable if many states were exempted by the courts, and whether EPA's discussion of severability was a sufficient response to any such concerns.

These are not much different than the kinds of issues that the D.C. Circuit routinely deals with in reviewing important EPA rules. It remains unclear to me why the Supreme Court feels the need to consider intervening rather than allowing the litigation to play out in the D.C. Circuit. Hopefully, we’ll know more after the oral argument.